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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ARIZONANS FOR OFFICIAL ENGLISH
and ROBERT D. PARK,

Petitioners,

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ;
JAIME GUTIERREZ; and ARIZONANS AGAINST
CONSTITUTIONAL TAMPERING,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND UNITED STATES REPRESENTATIVES CHARLES T. CANADY, TOBY ROTH, HENRY J. HYDE, BOB LIVINGSTON, BILL BAKER, DOUG BEREUTER, THOMAS J. BLILEY, JR., PETER BLUTE, SONNY BONO, ED BRYANT, PHILIP M. CRANE, JOHN T. DOOLITTLE, ROBERT K. DORNAN, BOB GOODLATTE, MEL HANCOCK, MARTIN HOKE, DANA ROHRABACHER, ED ROYCE, MATT SALMON, JIM SENSENBRENNER, JR., AND CHARLES H. TAYLOR AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit law and policy center with more than 100,000

supporters nationwide. WLF participates in litigation and administrative proceedings affecting the broad public interest, and has a particular interest in opposing intrusions by the federal government into decisions about the operations of state governments, where those decisions are properly reserved to the states' citizens. In that regard, WLF has participated as a party or *amicus curiae* in numerous cases before this Court, as well as other courts across the country. For example, in *Wilson v. Voting Rights Coalition* (Sup. Ct. No. 95-673), WLF filed a brief supporting California in its litigation over the constitutionality of the unfunded mandates in the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-1 *et seq*. WLF also filed a brief before the lower court, sitting *en banc*, in the present litigation.

United States Representatives Charles T. Canady, Toby Roth, Henry J. Hyde, Bob Livingston, Bill Baker, Doug Bereuter, Thomas J. Bliley, Jr., Peter Blute, Sonny Bono, Ed Bryant, Philip Crane, John T. Doolittle, Robert K. Dornan, Bob Goodlatte, Mel Hancock, Martin Hoke, Dana Rohrabacher, Ed Royce, Matt Salmon, Jim Sensenbrenner, Jr., and Charles H. Taylor are Members of Congress who oppose the ruling of the court below and who believe it warrants review by this Court. These Members are concerned by the decisions's potential implications with respect to any future legislation on "official English" by the states and by Congress. They are also concerned by the implications for government operations generally of the holding that public employees have a presumptive right under the First Amendment to determine how and whether to comply with official directives concerning "expressive" job functions.

Rep. Charles T. Canady is chairman of the Subcommittee on the Constitution of the House Judiciary Committee.

Rep. Toby Roth is the sponsor of H.R. 739, the Declaration of Official English Act, a bill to declare English as the official language of the United States Government. Many of the Members joining this brief are among the 94 current co-sponsors of H.R. 739.

Rep. Henry J. Hyde is chairman of the House Judiciary Committee.

Rep. Bob Livingston is chairman of the House Appropriations Committee.

Amici believe that government policy, particularly in a diverse society such as ours, should promote the use of a common language. *Amici* further believe that it is constitutionally permissible for voters to determine that their government must act in that common language in most circumstances as a means of increasing government efficiency and furthering civic and social unity.

All parties have consented to the participation of the *amici*. Consent letters from counsel have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

This case presents this Court with an important opportunity to decide an issue of great and enduring national importance: whether the government may direct its employees to perform the government's official business exclusively in a particular language. By the narrowest of margins — a six-to-five vote of an *en banc* panel — the U.S. Court of Appeals for the Ninth Circuit took the extraordinary step of striking down the "Official English" provision of the Arizona state constitution. The decision below was based on the purported First Amendment rights of public employees essentially to commit insubordination while on the job; the analyses of the several majority and dissenting opinions turn largely on the application of decisions of this Court. Thus, only this Court can provide definitive guidance.

The constitutional issues presented in this case have import far beyond the borders of Arizona: Official English provisions have been adopted by constitutional amendment or statute in many states, and bills to enact such legislation on the federal level are before Congress. A decision by the Court in this case will not only eliminate uncertainty as to the validity of Official English provisions, but also provide important direction to lower courts as to a variety of legal issues involving government policy on language. In light of the extensive analysis of the legal issues by the courts below and legal commentators, the Court should take this opportunity to address the extent to which the U.S. Constitution constrains government action to preserve English as the nation's common and official language.

ARGUMENT

I. The Issues Presented by the Petition Are Matters of Great National Importance Deserving Review by this Court.

This Court should grant a writ of certiorari and review the decision below of the Ninth Circuit because the case squarely presents an issue of great national significance: may the people direct their government to conduct its official business only in the people's common language. Regardless of one's position on the merits of that question, it is an issue that has been closely scrutinized, hotly debated, and frequently raised, and one that deserves this Court's review at this time and in this case.

The decision below cries out for review. By a six-to-five vote of an *en banc* panel, the Ninth Circuit held Article XXVIII of the Arizona Constitution to be invalid under the U.S. Constitution. That constitutional provision had been adopted by a vote of the people of Arizona in 1988. Invalidation of a state law — particularly a state constitutional provision, and even more so one adopted by popular vote — is an extremely serious step that should be taken only in unusual cases after the most stringent review. Indeed, such a decision of an inferior federal court would have fallen within this Court's mandatory appellate jurisdiction under 28 U.S.C. § 1254(2) (1982) prior to the 1988 amendment of that statute. The gravity of the Ninth Circuit's invalidation of a state constitutional provision by a closely divided vote now justifies this Court's review by way of its discretionary jurisdiction.

The Arizona "Official English" constitutional provision at issue in this case is not a unique political phenomenon,

and definitive resolution of the central issues may eliminate uncertainty as to constitutional constraints and obviate further costly litigation. Several states have adopted similar constitutional provisions;[1] many more have enacted legislation to the same effect;[2] and Official English bills and ballot propositions have been advanced in many others. In addition, Congress has considered Official English constitutional amendments on at least three occasions in recent years.[3] Indeed, at this time, Congress is considering several bills that would declare English the official language of the United States and require functions of the federal government to be performed exclusively in English in most or all circumstances.[4] Many of these legislative

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[1] *See* Ala. Const. amend. 509; Cal. Const. art. III, § 6; Colo. Const. art. II, § 30a; Fla. Const. art. II, § 9; Neb. Const. art. I, § 27; *see also* Haw. Const. art. XV, § 4 (making English and Hawaiian official languages).

[2] *See* Ark. Stat. Ann. § 1-4-117 (1995); 1986 Ga. Laws 529; 5 Ill. Compiled Stat. Ann. 460/20 (Michie 1995); Haw. Rev. Stat. § 1-13 (1995); Ind. Code Ann. § 1-2-10-1 (Burns 1995); Ky. Rev. Stat. Ann. § 2.013 (Michie 1995); Miss. Code Ann. § 3-3-31 (1995); Mont. Code Ann. § 1-1-510 (1995); 1995 N.H. Laws 157; N.C. Gen. Stat. § 145-12 (1995); N.D. Cent. Code § 54-02-13 (1995); S.C. Code Ann. § 1-1-696 (Law. Co-op. Supp. 1993); S.D. Codified Laws Ann. §§ 1-27-20 to 1-27-26 (1995); Tenn. Code Ann. § 4-1-404 (1995); Va. Code Ann. § 22.1-212.1 (Michie 1995).

[3] *See* S.J. Res. 72, 97th Cong., 1st Sess. (1981); *The English Language Amendment: Hearing on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984); S.J. Res. 13, 100th Cong., 1st Sess. (1987).

[4] *See Making English the Official Language of the United States: Hearing Before the Senate Governmental Affairs Comm.*, 104th (continued...)

actions have been prompted by national and state organizations committed to affirming the role of English as the common language of the United States, including U.S. English, English Language Advocates, and petitioner Arizonans for Official English.

Nor is the Official English issue one of fleeting political significance. The end of the Cold War has seen the reemergence of cultural and linguistic units as powerful political forces around the world. The interaction between language and government, particularly the designation of certain languages as the official languages of government, has become a fundamental regime question threatening the political integrity and stability of several nations, including the former Soviet Union and Canada.[5] The ongoing struggle to preserve the Canadian federation in light of linguistic differences will continue to fuel concerns about the possibility of similar strains in American society, which

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[4] (...continued)
Cong., 1st Sess. (1995); S. 356, 104th Cong., 1st Sess. (introduced Feb. 6, 1995); S. 175, 104th Cong., 1st Sess. (introduced Jan. 10, 1995); H.J. Res. 109, 104th Cong., 1st Sess. (introduced Sept. 29, 1995); H.R. 1005, 104th Cong, 1st Sess. (introduced Feb. 22, 1995); H.R. 739, 104th Cong., 1st Sess. (introduced Jan. 31, 1995); H.R. 123, 104th Cong., 1st Sess. (introduced Jan. 10, 1995).

[5] *See, e.g.*, Frank M. Lowrey, IV, Comment, *Through the Looking Glass: Linguistic Separatism and National Unity*, 41 Emory L.J. 223 (1992); Terrence Meyerhoff, Note and Comment, *Multiculturalism and Language Rights in Canada: Problems and Prospects for Equality and Unity*, 9 Am. U.J. Int'l L. & Pol'y 913 (1994); Kevin Sneesby, Comment, *National Separation: Canada in Context — A Legal Perspective*, 53 La. L. Rev. 1357, 1358-59 (1993).

will in turn drive legal efforts regarding the official status of the English language.[6]

This case poses most directly the question whether the government may require its employees to conduct official state business in a particular language. That issue, however, is closely related to several other issues of national importance and great concern, and a ruling by the Court in this case no doubt will provide guidance in related areas. Such related issues include whether there is a right to receive government services in languages other than English;[7] whether private employers may require their employees to speak English during business hours;[8] whether the government may require private businesses to

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[6] For example, in arguing for federal Official English legislation in recent congressional hearings, *amicus* U.S. Representative Toby Roth queried, "Could America fragment like Canada almost did?" He warned that the recent Quebec vote on secession was a "red warning light" for Americans. Jim Abrams, *Official English Needed to Keep Nation Together, Supporters Say*, Ariz. J., Dec. 27, 1995, at 4. Similarly, U.S. Senator Richard Shelby noted that "Canada offers a great case in point" for the proposition "that accommodating diverse languages only promotes instability, resentment and a threat to national sovereignty." *Id.*

[7] *See Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022 (9th Cir. 1978); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973); *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994); *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975).

[8] *See Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

communicate certain messages (such as consumer product safety warnings) in languages other than English;[9] and whether linguistic skills may properly be considered in jury selection.[10] While different legal standards apply in many of these other contexts, as a practical matter there will no doubt be a substantial spill-over effect from a decision by this Court in this case.

This Court's guidance on such issues is indispensable. The Ninth Circuit's 6-5 *en banc* decision turns in great measure on the interpretation and application of decisions by this Court, including not only its seminal decision on language rights in *Meyer v. Nebraska*, 262 U.S. 390 (1923), but also several recent decisions bearing on the First Amendment rights of public employees.[11] Only this Court can give definitive instruction on the meaning and import of its prior decisions.

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[9] *See Stanley Indus. v. W.M. Barr & Co.*, 784 F. Supp. 1570 (S.D. Fla. 1992); *Ramirez v. Plough, Inc.*, 12 Cal. Rptr. 2d 423 (Ct. App. 1992), *rev'd*, 863 P.2d 167 (Cal. 1993); 40 C.F.R. § 156.206(e) (1995) (EPA regulation requiring Spanish-language warning statements in certain circumstances); 16 C.F.R. § 307.5 (1995) (FTC regulation requiring tobacco warnings to be in predominant language of non-English periodicals).

[10] *See Hernandez v. New York*, 500 U.S. 352 (1991); *Pemberthy v. Beyer*, 19 F.3d 857 (3d Cir.), *cert. denied*, 115 S. Ct. 439 (1994); *United States v. Ramos Colon*, 415 F. Supp. 459 (D.P.R. 1976).

[11] *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995); *Waters v. Churchill*, 114 S. Ct. 1878 (1994); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Connick v. Myers*, 461 U.S. 138 (1983).

II. The Issues Presented by the Petition Are Ready for Review by this Court.

This case and the issues it presents are ripe for review by this Court. While only the Ninth Circuit among the Courts of Appeals has rendered a decision on the constitutionality of an Official English provision, it would be both unnecessary and unproductive for this Court to pass on this opportunity in order to allow the issues to percolate among the circuits. This is not a situation in which only one three-judge panel has considered the merits of the legal controversy. In this action alone, thirteen Ninth Circuit judges — the equivalent of more than four circuit panels — have written or joined panel or *en banc* opinions. The Ninth Circuit, sitting *en banc*, voted 6-5 to strike down Arizona's constitutional provision, and produced one majority opinion, two concurring opinions, and three dissenting opinions. Nor is this the only case in which the Ninth Circuit has considered English-language-only rules for public employees.[12] Where the issue was of such pressing concern, this Court has accepted review without requiring consideration by multiple circuits or even one circuit.[13]

That the issues have been sufficiently raised and explored is confirmed not only by the lower courts' several

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[12] *See Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir.), *reh'g denied*, 861 F.2d 1187, 1188 (9th Cir. 1988) (Kozinski, J., dissenting from denial of rehearing en banc), *vacated*, 490 U.S. 1016 (1989).

[13] *See, e.g., Mistretta v. United States*, 488 U.S. 361, 362 (1989) (granting certiorari before judgment in the Eighth Circuit in order to consider constitutional issues).

opinions, but also by the extensive legal commentary and scholarship on Official English proposals that have been published over many years.[14] In addition, numerous analyses have been published about related issues, including the relationship between government and language rights,[15]

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[14] *See, e.g., Language Loyalties: A Source Book on the Official English Controversy* (James Crawford ed. 1992); Dennis E. Baron, *The English-Only Question: An Official Language for Americans* (1990); *Perspectives on Official English* (Karen L. Adams & Daniel T. Brink eds. 1990); Daniel J. Garfield, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 Nw. U.L. Rev. 690 (1995); Andrew P. Averbach, Note, *Language Classifications and the Equal Protection Clause: When Is Language a Pretext for Race or Ethnicity?*, 74 B.U.L. Rev. 481 (1994); Andre Sole, *Official English: A Socratic Dialogue/Law and Economics Analysis*, 45 Fla. L. Rev. 803 (1993); Carol Schmid, Comment, *Language Rights and the Legal Status of English-Only Laws in the Public and Private Sector*, 20 N.C. Cent. L.J. 65 (1992); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 Minn. L. Rev. 269 (1992); Rachel F. Moran, *Irritation and Intrigue: The Intricacies of Language Rights and Language Policy*, 85 Nw. U.L. Rev. 790 (1991); Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 Harv. C.R.-C.L. L. Rev. 293 (1989); Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 Harv. L. Rev. 1345 (1987); Valerie A. Lexion, Note, *Language Minority Voting Rights and the English Language Amendment*, 14 Hastings Const. L.Q. 657 (1987); Joseph Leibowicz, Comment, *The Proposed English Language Amendment: Shield or Sword?*, 3 Yale L. & Pol'y Rev. 519 (1985).

[15] *See, e.g.*, Jose Roberto Juarez, Jr., *The American Tradition of Language Rights: The Forgotten Right to Government in a "Known Tongue"*, 13 Law & Ineq. J. 443 (1995); Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven*

(continued...)

English-only policies in private employment settings,[16] language requirements for consumer product warnings,[17]

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[15] (...continued)
Multiracial Society, 81 Calif. L. Rev. 863 (1993).

[16] *See, e.g.*, David T. Wiley, Note, *Whose Proof?: Deference to EEOC Guidelines on Disparate Impact Discrimination Analysis of "English-Only" Rules*, 29 Ga. L. Rev. 539 (1995); Dan Cooperider & Stephen Wiss, *Employment Law: The Limits of Deference: The Ninth Circuit Rejects EEOC Guidelines on English-Only Rules in the Workplace — Garcia v. Spun Steak*, 25 Golden Gate U.L. Rev. 119 (1995); Tanya J. Stanish, Comment, *English-Only Rules in the Workplace: Discrimination or Employer Prerogative? A Comment on Spun Steak v. Garcia*, 7 DePaul Bus. L.J. 435 (1995); Jeffrey D. Kirtner, Note, *English-Only Rules and the Role of Perspective in Title VII Claims*, 73 Tex. L. Rev. 871 (1995); Patrick Wallace, Note, *English-Only Rules in the Workplace: Examining the Need to Balance the Burdens of Proof Under Disparate Impact Analysis*, 7 DePaul Bus. L.J. 223 (1994); Cara D. Helper, Comment, *Enforcing the Equal Employment Opportunity Commission Guidelines on Discrimination Because of National Origin: The Overextension of English-Only Rules in Garcia v. Spun Steak Co.*, 79 Minn. L. Rev. 391 (1994); Juan F. Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. Mich. J.L. Ref. 265 (1990); Aileen Maria Ugalde, Comment, *"No Se Habla Español": English-Only Rules in the Workplace*, 44 U. Miami L. Rev. 1209 (May 1990); Linda M. Mealey, Note, *English-Only Rules and "Innocent" Employers: Clarifying National Origin Discrimination and Disparate Impact Theory Under Title VII*, 74 Minn. L. Rev. 387 (1989).

[17] *See, e.g.*, R. Geoffrey Dillard, Note, *Multilingual Warning Labels: Product Liability, "Official English," and Consumer Safety*, 29 Ga. L. Rev. 197 (1994); Linda M. Baldwin, Note, *Ramirez v. Plough, Inc.: Should Manufacturers of Nonprescription Drugs Have a Duty to Warn in Spanish?*, 29 U.S.F.L. Rev. 837 (1995); Thomas H. Lee, Note, *A Purposeful Approach to Products Liability Warnings and Non-English-Speaking Consumers*, 47 Vand. L. Rev. 1107 (1994); Kelly (continued...)

and language restrictions and considerations in jury selection.[18]

Moreover, this case is procedurally appropriate for review by this Court. The dispute is not fact-bound and does not require further findings by the district court. The Ninth Circuit construed the Arizona constitutional provision on its face rather than as applied to the specific facts of Respondent Maria-Kelley F. Yniguez.

Finally, in light of the ruling below by an *en banc* vote of the Ninth Circuit, which includes many of the states most likely to adopt and enforce Official English provisions, it is difficult as a practical matter to see how the issues presented by Petitioners could again be brought before this Court for review. This Court should avail itself of the opportunity to decide the issues presented.

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[17] (...continued)
Cox, *The Duty to Warn: Should California Extend the Duty to Include Foreign Language Warnings?*, 1 San Diego Justice J. 517 (1993).

[18] *See, e.g., Recent Case: Constitutional Law — Peremptory Challenges — Third Circuit Holds that Peremptory Challenges Based on Foreign Language Ability do not Violate the Equal Protection Clause — Pemberthy v. Beyer, 19 F.3d 857 (3d Cir. 1994)*, 108 Harv. L. Rev. 769 (1995); Cynthia L. Brown, Note, *A Challenge to the English-Language Requirement of the Juror Qualification Provision of New York's Judiciary Law*, 39 N.Y.L. Sch. L. Rev. 479 (1994); Andrew McGuire, *Peremptory Exclusion of Spanish-Speaking Jurors: Could Hernandez v. New York Happen Here?*, 23 N.M.L. Rev. 467 (1993).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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